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MATANG SELATAN ENGINEERING SDN BHD v. KERAJAAN NEGERI MELAKA

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[CIVIL APPEAL NO: 12B-11-07-2015]
1 FEBRUARY 2017

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CONTRACT: *Breach – Agreement – Letter of acceptance of tender – Terms in letter binding on parties pending execution of formal contract – Payment terms based on interim certificates of payment – Subsequent agreement changing mode of payment to deferred payment – Change in terms of payment not included in formal contract – Issuance of interim payment certificates despite execution of formal contract – Whether failure to pay sums certified in interim payment certificates constituted breach of contract*

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CONTRACT: *Quantum meruit – Tender agreement – Contract unlawfully terminated – Premature termination – Claim for quantum meruit – Whether sum claimed for admitted by defaulting party – Whether admission of sum claimed sufficient in law – Whether claim ought to be allowed*

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The respondent, *vide* a letter of acceptance of tender dated 12 January 2007, accepted the appellant's tender bid to carry out the contract works for a project at the contract price of RM12 million. The terms of the letter of acceptance of tender was to be contractually binding pending the execution of a formal contract. According to the letter of acceptance, the appellant was to take possession of the site on 21 February 2007. However, the respondent only delivered possession of the entire stretch of the site on 18 June 2007. The original contract provided for progressive payments in accordance to interim payment certificates approved by the superintending officer ('the SO'). The SO approved and issued a total of 11 interim certificates of payments, but the respondent did not make payments on any of the interim certificates of payment. Sometime in September 2007, the respondent informed the appellant of a change in the mode of payment from the interim progress payment to deferred payment, which meant that no payments would be made until the entire contract works had been completed. The respondent forwarded to the appellant a document termed as 'Tambahan Surat Setuju Terima Tender' containing the proposed amendment. The appellant, *via* its managing director, signed on the 'Tambahan Surat Setuju Terima Tender'. However, the respondent's representative did not execute the document. Subsequently, the parties executed the formal contract in the form of the Standard PWD Contract, containing the standard contract terms. There was no mention of or reference to the 'Tambahan Surat Setuju Terima Tender'

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in the formal contract and neither was the payment terms stipulated in the formal contract. Post execution of the formal contract, the SO continued to issue interim certificates of payment. On 8 January 2008, the respondent issued a written warning to the appellant about the delay in the execution of the contract works. Subsequently, *vide* a letter dated 25 January 2008, the respondent gave notice of intention to terminate the contract. Despite the notice of intention to terminate the contract, the SO continued to further certify interim payments certificates. In a meeting between the parties on 8 May 2008, it was agreed that the respondent should pay the appellant progressively and not on a deferred basis and that the completion date should be at the end December 2008. However, in breach of the agreement reached at the meeting, the respondent issued a notice of termination of contract. Thereafter, the respondent carried out a valuation of works done by the appellant and certified that the appellant had done works valued at RM2,745,173.52, the amount claimed by the appellant in the counterclaim on the basis of *quantum meruit*. The respondent claimed the sum of RM78,362.75 from the appellant and subsequently revised the sum to RM239,546.75, the amount claimed in the present proceedings.

Held (allowing appeal):

(1) The respondent was in breach of the contract by failing to make timely payment of the certified sums in the interim certificate of payment. The proposed amendment to the payment mode from that of the progressive certified payments to deferred payment upon completion did not crystallise and was never incorporated into the contract. Although the appellant had agreed in principle to the proposed amendment to the payment mode and its director had signed it, the respondent's authorised person had never executed it. (para 25)

(2) When the formal contract was subsequently entered into, the contractual mode of payment remained as the original certified interim progress payment. None of the terms contained in the 'Tambahan Surat Setuju Terima Tender', including the proposal for the respondent to pay 8.75% per annum interest in consideration of the deferred payment, were incorporated into the formal contract. Therefore, the final contract between the parties was as contained in the formal contract. Further, the terms of the contract stipulated that the respondent should pay the sum certified in the interim payment certificate within 30 days of its issuance. Thus, the non-payment of the sums certified in the 11 interim payment certificates within 30 days of their issuance was a clear breach of contract by the respondent. (paras 25 & 26)

(3) The agreement dated 8 May 2008 was a clear indication of the respondent's acceptance of the fact that the delay in the completion of the project arose from the respondent's non-payment of the certified interim payments. Following the agreements reached at the meeting, the doctrine of estoppels would disentitle the respondent to rely on the antecedent delay as well as on the grounds stated in the notices of 23 May 2008 and 13 June 2008 to terminate the contract under the provisions of terms of the contract. Therefore, there were no proper and valid grounds for the respondent to lawfully terminate the contract. The respondent was not entitled to claim for the sum RM239,546.75 and the claim ought to be dismissed. Further, a litigant ought not to be allowed to benefit from his own wrongdoing. As the respondent's pleaded case arose out of its own wrongful/unlawful acts, it could not rely on its own breach to ground the claim for damages. (paras 27-28)

(4) A claim for *quantum meruit* is based on works done and not based on the fact that the whole project has been fully completed. In the present case, the contract had been brought to an unlawful and premature end by the respondent. The respondent had certified that as at the date of termination, the appellant had done works to the value of RM2,745,173.52. The admission in the form of the certification was sufficient in law to entitle the appellant to be paid based on *quantum meruit*. (paras 30 & 31)

Case(s) referred to:

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Kerajaan Malaysia v. Global Upline Sdn Bhd and Another Appeal [2016] 1 LNS 1158 CA ***(refd)***

Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Poh Geok Sing v. HB Enterprise Sdn Bhd [2006] 1 CLJ 765 CA ***(refd)***

Poon Guan Sdn Bhd v. Sem Siong Industries Sdn Bhd [1983] 2 CLJ 208; [1983] CLJ (Rep) FC ***(refd)***

Tan Hock Chan v. Kho Teck Seng [1979] 1 LNS 110 FC ***(refd)***

For the plaintiff - Muzila Arsad; State Legal Advisor, Melaka
For the defendant - Norulhuda Ninggal; M/s Kartini & Partners

Reported by S Barathi

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] This is an appeal from the decision of the Sessions Court in Malacca, wherein the learned Sessions Judge had allowed the claim by the plaintiff/respondent for the sum of RM239,546.75 and dismissed the defendant/appellant's counterclaim for the sum of RM2,745,173.52.

[2] I had allowed the appeal and reversed the decision of the learned Sessions Judge for the following reasons.

[3] The facts are as follows. The plaintiff/respondent had *vide* letter of acceptance of tender dated 12 January 2007 (pp. 237-240 of the appeal record) accepted the defendant/appellant's tender bid to carry out the contract works for the "Projek Jalan Bukit Baru-Duyong, Melaka" (referred to as the "project"). The contract price was RM12 million. The letter of acceptance of tender states that pending the execution of a formal contract, the terms of the letter of acceptance of tender would be contractually binding.

[4] According to the letter of acceptance of tender the defendant/appellant was to take possession of site on 21 February 2007, however the plaintiff/respondent only delivered possession of the entire stretch of the site on 18 June 2007. The delay in handing possession of the entire site was caused by the plaintiff/respondent's delay in making payments of compensation to land owners whose land had been compulsorily acquired for the project. See letter dated 14 June 2007 from the Pengarah JKR Melaka which is found at p. 434 of the appeal record. Nevertheless, the defendant/respondent had commenced works after accepting the letter of acceptance of tender and well before 14 June 2007 as evidenced by the interim payment certificates.

[5] The original contract provided for payments for works properly executed by the defendant/respondent to be paid progressively in accordance to interim payment certificates approved by the Pengarah JKR Melaka, who was the Superintending Officer ("SO").

[6] The SO approved and issued a total of 11 interim certificates of payment dated from 3 April 2007 to 29 April 2008. See pp. 358 to 404 of the appeal record. The contract states that the plaintiff/respondent shall pay the defendant/appellant the payment approved in the interim payment certificates within 30 days of issuance of the certificate. However, in breach of this stipulation the plaintiff/respondent did not make payments on any one of the interim certificates of payment. The cumulative total of the sums approved in these 11 interim certificates of payment is RM2,548,000. See p. 404 of the appeal record.

[7] The defendant/appellant was offered contract-financing facility amounting to RM4,190,000 from Affin Bank to facilitate the financing of the contract works. Affin Bank's letter of offer dated 11 June 2007 is found at pp. 428 to 431 of the appeal record. However, subsequently by letter-dated 12 July 2007, Affin Bank revoked and cancelled that offer for reasons that will become apparent soon.

[8] The plaintiff/respondent instead of making the approved interim payments had sometime in September 2007 informed the defendant/appellant of a change in the mode of payment from that of interim progress payments to that of deferred payment, which meant that no payments would be made until the entire contract works had been completed. The plaintiff/respondent forwarded to the defendant/appellant a document termed as "Tambahan Surat Setuju Terima Tender" containing this proposed amendment. See pp. 241 to 244 of the appeal record. In the Tambahan Surat Setuju Terima Tender it is stated that:

(a) payment would be deferred and paid upon completion of the works in the following manner:

i. 50% be paid upon issuance of the Sijil Perakuan Siap Kerja;

ii. 25% be paid three months thereafter; and

iii. 25% be paid a further three months thereafter.

(b) the contract period is 56 weeks (14 months);

(c) in order to facilitate the contract works the defendant/respondent is to get financing facilities from any licensed banks in Malaysia and the plaintiff/respondent would pay the defendant/appellant 8.75% interest per annum on the contract sum to compensate the defendant/respondent;

(d) to facilitate the progressive disbursement of the bank loan to the defendant/appellant, the SO would do periodic progressive interim certification of works carried out by the defendant/appellant;

(e) the conditions of contract to be used for the formal contract would be the "Syarat-syarat Kontrak PWD 203A Rev 10/83" with the relevant amendments to reflect the amended "deferred payment scheme".

[9] It is obvious from the contents of this document that the plaintiff/respondent did not have the available financial resources necessary for the project's implementation in accordance to the original contract to pay the defendant/appellant by progressive interim payments. In order to overcome this financial constrain and implement the project the plaintiff/respondent wanted the defendant/appellant to borrow from a bank the entire project cost and as a sweetener was prepared to pay interest at 8.75% per annum to offset the financial cost of borrowing.

[10] The defendant/appellant states that they wanted to save the contract and were left with no choice but to sign this document as they had already carried out almost RM3 million worth of the contract works and had not been paid. The defendant's Managing Director signed on the Tambahan

Surat Setuju Terima Tender on 26 September 2007 and forwarded it to the plaintiff/respondent for it to be signed by the State Finance Officer. However, as it is apparent on the face of it, the plaintiff's representative, ie, the State Finance Officer, did not execute the Tambahan Surat Setuju Terima Tender. See p. 242 of the appeal record. Therefore, it is questionable whether the terms of the Tambahan Surat Setuju Terima Tender has amended the original contract. I will cover this issue in more detail in a while.

[11] The defendant/appellant, nevertheless, wrote to Affin Bank seeking a revision of the terms of their letter of offer dated 11 June 2007 to facilitate the implementation of the project according to the proposed revised contract terms contained in the Tambahan Surat Setuju Terima Tender. However, Affin Bank *via* letter dated 12 November 2007 declined to revise their offer as they were not agreeable to finance the project in accordance to the deferred payment scheme as stated in the Tambahan Surat Setuju Terima Tender. See p. 433 of the appeal record.

[12] The parties then executed the formal contract in the form of the Standard PWD Contract, containing the standard contract terms as in Borang JKR 203A (Semakan 10/83). The formal contract bearing "Kontrak No: JKR/NEG/M/2/2007" was made on 18 December 2007 and is found at pp. 245 to 337 of the appeal record. It is pertinent to note that at the front page of the formal contract it is stated that the surat setujuterima tender is to be read and construed as part of the contract. The words in the Malay language reads "... Surat Setujuterima Tender yang menjadi sebahagian daripada kontrak tersebut dan yang hendaklah dibacakan dan diertikan sedemikian." See p. 245 of the appeal record. However, there is no mention of or reference to the Tambahan Surat Setuju Terima Tender in the formal contract. Neither are the payment terms stipulated in the formal contract amended from the interim progressive payments based on interim certification to that of deferred payment upon completion in accordance to the terms contained in the Tambahan Surat Setuju Terima Tender. In fact post execution of the formal contract, the SO continued to issue Interim Certificates of Payment and that continued up till Interim Certificate of Payment No. 11 dated 29 April 2008.

[13] On 8 January 2008, the plaintiff/respondent issued a written warning to the defendant about delay in the execution of the contract works and instructed the defendant/appellant to show diligence and to speed up the works by increasing machinery and workers on site. See pp. 343-349 of the appeal record. Thereafter, *vide* letter dated 25 January 2008, the plaintiff/respondent gave notice of intention to terminate the contract. See pp. 350-352 of the appeal record. The main problem faced by the defendant/appellant was the negative cash flow caused by the non-payment by the

plaintiff/respondent on any of the interim certificates of payment as well as the revocation of the banking facilities by Affin Bank, which was caused by the proposed change in payment terms by the plaintiff/respondent. Despite the notice of intention to terminate the contract, the SO continued to certify further interim payments, including Interim Certificates of Payments Nos. 9, 10 and 11, dated 17 March 2008, 28 April 2008 and 29 April 2008 respectively.

[14] The Ketua Penolong Pengarah (Jalan) Jabatan Kerja Raya, Melaka, then issued a notice dated 5 May 2008 calling for a "Mesyuarat Penyelarasan Projek" to discuss issues pertaining to the project. The meeting was held on 8 May 2008 and was chaired by YB En. Gan Tian Loo, the Pengerusi Jawatan Kuasa Kerjaya Dan Kemudahan Awam of the plaintiff. Amongst the attendees at the meeting were:

(i) Datuk Abdul Razif bin Ibrahim (SP1) – the Pengarah JKR Melaka;

(ii) En Shaharuddin bin Bahari (SP2) – Penolong Pengarah (Jalan) JKR, Melaka; and

(iii) En Samsudin bin Akil (SD1) – Defendant's director.

The minutes of the meeting held on 8 May 2008 is found at pp. 407-409 of the appeal record. The minutes which was approved by Hj Zainuddin bin Harun, the Penolong Pengarah (Jalan) Jabatan Kerja Raya, Melaka, *inter alia* shows that following was resolved:

(i) the plaintiff/respondent agreed to change the payment mode of the contract from deferred payment to that as stipulated in the contract, ie, progressively based on Interim Certificates of Payment;

(ii) the plaintiff/respondent has allocated RM6 million for the year 2008 and another RM6 million for the year 2009 for the project;

(iii) the defendant/appellant is to complete the project by end December 2008 and that the plaintiff/respondent would pay RM6 million in the year 2008 and the balance RM6 million would be paid after completion in 2009.

[15] However, in breach of the agreement reached at the meeting of 8 May 2008, the plaintiff/respondent issued a letter dated 23 May 2008 giving notice of intention to terminate the contract. See pp. 353-354 of the appeal record. This was followed by a notice of termination of contract dated 13 June 2008 signed by Datuk Abdul Razif bin Ibrahim (SP1), the Pengarah JKR, Melaka. See pp. 356-357 of the appeal record.

[16] The defendant/appellant appealed that decision *vide* letter dated 16 June 2008. See pp. 425-427 and 435-437 of the appeal record. However, there was no response from the plaintiff/respondent.

[17] The plaintiff/respondent then on 19 June 2008 carried out a valuation of work done by the defendant/appellant and certified that the defendant/appellant had done work valued at RM2,745,173.52, which is the amount claimed by the defendant/appellant in the counterclaim on the basis of *quantum meruit*.

[18] The plaintiff/respondent then issued a document termed as "Perakuan Muktamad Kontrak Yang Ditamatkan Pengambilan Kerja Kontrak" dated 16 June 2008 wherein the plaintiff/respondent claimed the sum of RM78,362.75 as being due and payable by the defendant/appellant as a result of the termination of contract. See pp. 410-412 of the appeal record.

[19] The plaintiff/respondent made a demand by letter dated 19 May 2010 for the sum of RM78,362.75. See pp. 416-417 of the appeal record.

[20] A year later the plaintiff/respondent issued a revised "Perakuan Muktamad Kontrak Yang Ditamatkan Pengambilan Kerja Kontrak" dated 22 June 2011 in which the plaintiff/respondent's loss/damages arising from the termination of the contract is said to be RM239,546.75, which the plaintiff/respondent claims is due and payable by the defendant/appellant pursuant to the fasal 51(c) of the syarat-syarat kontrak. The defendant/appellant has refused to pay this sum. Hence, this claim by the plaintiff/respondent for the sum of RM239,546.75.

[21] A total of three witnesses gave testified at trial – two for the plaintiff/respondent and one for the defendant/appellant. The learned Sessions Court Judge had allowed the plaintiff/respondent's claim and dismissed the defendant/appellant's counterclaim. The grounds of judgment are found at pp. 6-25 of the supplementary appeal record.

[22] The principles of law on appellate intervention are well settled. An appellate court is generally slow to disturb the findings of fact by the trial judge unless it can be shown that there has been clear lack of judicial appreciation of the evidence such that it would render the decision of the trial court as being plainly wrong. In *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064; [2014] MLJU 1807 Raus Sharif PCA in delivering the unanimous judgment of the Federal Court explained that in cases where the trial court has so fundamentally misdirected itself the appellate court is duty bound to intervene. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441 reiterated this principle in the following terms:

A … It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin & Anor (P) v. Lee Ing Chin @ Lee Teck Seng & Anor* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (at p 10) per Steve Shim CJ SS. More recently this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v.* B *Genisys Integrated Pte Ltd* [2010] 9 CLJ 785 where it was held at p 800:

> It is well-settled law that an appellate court will not generally speaking intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no C or insufficient judicial appreciation of evidence (see *Chow Yee Way & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309.

The Court of Appeal in a very recent case *Kerajaan Malaysia v. Global Upline* D *Sdn Bhd and Another Appeal* [2016] 1 LNS 1158; [2017] 1 MLJ 170 CA held that:

> ... the failure to consider the entirety of the evidence and material issues or the failure to make findings of fact or the making of bare findings of fact will invite appellate intervention. Such omissions by a trial judge will E require the appellate courts to take on the role of first instance judge and review the evidence in its entirety afresh.

[23] Having read the learned Sessions Judge's grounds of judgment, I find for reasons that will become apparent shortly, that there is insufficient appreciation of the evidence in its entirety by the trial judge in arriving at F the conclusion that the termination of the contract by the plaintiff/respondent was lawful and that the plaintiff/respondent was entitled to the damages claimed. Thus, in keeping with the above pronouncements of the Court of Appeal and Federal Court, I have taken on the role of judge of first instance to review afresh the evidence in its totality.

G **[24]** The termination of the contract was made pursuant to fasal 51 of the syarat-syarat kontrak on grounds that the defendant/appellant had failed to carry out the works regularly and diligently such that as at 20 May 2008 only 35% of the works had been completed when it should have been 78% according to the work schedule. The plaintiff/respondent states that despite H several notices being given to the defendant/appellant to speed up the works by adding more machinery and workers, the defendant/appellant had failed to do so. Thus, the plaintiff/respondent was of the view that the works could not be completed by the extended completion date on 12 July 2008. The defendant/appellant whilst acknowledging that there was some delay in the work's progress, submits that the reason for the delay is entirely the plaintiff/ I

respondent's, in that it arose from the non-payment of the sums due under the Interim Certificates of Payment No. 1 to No. 11 which had been approved and issued by the SO as well as the cancellation of the banking facility as a result of the plaintiff/respondent's desire to change the mode of payment. The defendant/appellant had brought up this matter non-payment and the resultant delay with the plaintiff/respondent, and at the Mesyuarat Penyelarasan No. 4 held on 8 May 2008, an agreement had been reached that the defendant/appellant would be paid progressively based on the interim certificates of payment and that the completion date is extended to end of December 2008. However, despite this agreement, and despite the assurance by the plaintiff/respondent that a sum of RM6 million had been allocated for this project for the year 2008, the defendant/appellant was not paid the outstanding certified sum of RM2,548,000 that was due and payable. Therefore, the defendant/appellant contends that the termination by the plaintiff/respondent is unlawful and submits that the provisions of fasal 51 of the syarat-syarat kontrak are not applicable.

[25] I agree with the defendant/appellant's contention that the plaintiff/respondent is in breach of the contract by failing to make timely payment of the certified sums in the interim certificate of payment. The original mode of payment is the progress payments based on the interim payment certificates. In fact, in keeping with this mode, the plaintiff/respondent through the SO had approved and certified 11 interim payments. The evidence clearly shows that the proposed amendment to the payment mode from that of progressive certified payments to deferred payment upon completion did not crystallise and was never incorporated into the contract. Though the defendant/appellant had agreed in principle to the proposed amendment to the payment mode and the several other matters contained in the Tambahan Surat Setuju Terima Tender and its director had signed and returned it to the plaintiff/respondent for their signature, it was never executed by the plaintiff/respondent's authorized person, ie, the State Finance Officer. Why the State Finance Officer did not sign the Tambahan Surat Setuju Terima Tender was never explained. Suffice to say that when the formal contract was subsequently entered into the contractual mode of payment as in fasal 47 remained as the original certified interim progress payment. None of the terms contained in the Tambahan Surat Setuju Terima Tender, including the proposal for the plaintiff/respondent to pay 8.75% per annum interest in consideration of the deferred payment were incorporated into the formal contract. Therefore, the final contract between the parties is as contained in the formal contract.

[26] Fasal 47(d) of the syarat-syarat kontrak stipulates that the plaintiff/respondent shall pay the sum certified in the Interim Payment Certificate within 30 days of its issuance. Thus, the non-payment of the sums certified in the 11 Interim Payment Certificates within 30 days of their issuance is a clear breach of contract by the plaintiff/respondent.

[27] In addition thereto, the parties had met on 8 May 2008 for the Mesyuarat Penyelarasan No. 4 and had agreed that the plaintiff/respondent shall pay the defendant/appellant progressively and not on a deferred basis. The parties also had agreed that the completion date shall be end December 2008. This agreement reached at the said meeting of 8 May 2008 was confirmed by SP2 Shaharuddin bin Bahari, who attended the meeting, and is also documented in the minutes of meeting. This agreement is a clear indication of the plaintiff/respondent's acceptance of the fact that the delay in the project completion had arisen from the plaintiff/respondent's non-payment of the certified interim payments, which had caused cash flow issues to the defendant/appellant. Following this agreement of 8 May 2008, the plaintiff/respondent ought to have paid the defendant/appellant the outstanding sum of RM2,548,000 and allowed the defendant/appellant to carry on and complete the contract works by end December. Instead, the plaintiff/respondent issued the notices dated 23 May 2008 and 13 June 2008 terminating the contract. Both these notices were issued under the hand of Datuk Abdul Razif bin Ibrahim (SP1), the Pengarah JKR Melaka, who was present at the Mesyuarat Penyelarasan No. 4 on 8 May 2008. Following the agreements reached between the parties at that meeting, the doctrine of estoppel would disentitle the plaintiff/respondent to rely on the antecedent delay as well as on the grounds stated in the notices of 23 May 2008 and 13 June 2008 to terminate the contract under the provisions of fasal 51 of the syarat-syarat kontrak. Therefore, I find that there are no proper and valid grounds for the plaintiff/respondent to lawfully terminate the contract. The plaintiff/respondent would only be entitled to damages flowing from a proper termination of the contract under the provisions of fasal 51. As the termination is unlawful, the plaintiff/respondent is disentitle to its claim for the sum RM239,546.75, and thus it ought to be dismissed.

[28] Further, it is clear from the foregoing that the plaintiff/respondent's pleaded case arises out of its own wrongful/unlawful acts. The courts have consistently held that a litigant ought not to be allowed to benefit from his own wrongdoing. The Federal Court in *Poon Guan Sdn Bhd v. Sem Siong Industries Sdn Bhd* [1983] 2 CLJ 208; [1983] CLJ (Rep) 326; [1983] 2 MLJ 317 held that:

> Slade LJ in *Cheall v. APEX* [1982] 3 All ER 855 referred to the reasoning of the speeches in *New Zealand Shipping Company Ltd v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1. The underlying principle there is that unless a contract clearly and specifically so provides, the court will not

construe an avoiding provision contained in it in such a manner so as to permit a party to take advantage of a situation brought about by his own act or omission.

Lord Atkinson said in the *New Zealand Shipping* case at page 9:

> But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.

Lord Finlay LC in the same case at page 6, puts it more briefly thus:

> It is a principle of law that no one can in such case take advantage of a state of things which he himself produced.

[29] Similarly Gopal Sri Ram JCA speaking for the Court of Appeal in *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489 stated the principle in the following terms:

> ... there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage if his own breach. See *Alghussein Establishment v. Eton College* [1988] 1 WLR 587 *New Zealand Shipping Co Ltd v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1.

Therefore, based on the facts of the case, the plaintiff/respondent as the blameworthy party who is in breach of contract cannot rely on its own breach to ground the present claim for damages.

[30] I will now look at the defendant/appellant's counterclaim for the sum of RM2,745,173.52 based on *quantum meruit*. A claim for *quantum meruit* is based on work done and not based on the fact that the whole project has been fully completed. This principle has been reaffirmed by the Court of Appeal in *Poh Geok Sing v. HB Enterprise Sdn Bhd* [2006] 1 MLJ 617; [2006] 1 CLJ 765 by Gopal Sri Ram JCA speaking for the court that:

> With regard to the claim on a quantum meruit, the general rule is that if a contract is an entire one the plaintiff cannot sue until the work has been completed (*Cutter v. Powell* 6 TR 320). One of the exceptions to this general rule is where, the special contract being unperformed, a new

A contract has been implied from the conduct of the parties to pay remuneration commensurate with the benefit derived from partial performance.

[31] In the present case the contract has been brought to an unlawful and premature end by the plaintiff/respondent. The plaintiff/respondent has B certified that as at the date of termination the defendant/appellant has done work to the value of RM2,745,173.52. The plaintiff/respondent has definitely derived benefit from the work done by the defendant/appellant in that another contractor was appointed to carry on from where the defendant/appellant had stopped and complete the project. This admission in the form C of certification by the plaintiff/respondent is sufficient in law to entitle the defendant/appellant to be paid based on *quantum meruit*. See also the Federal Court case of *Tan Hock Chan v. Kho Teck Seng* [1980] 1 MLJ 308; [1979] 1 LNS 110 where a claim for *quantum meruit* for contract works done partially was allowed.

D **[32]** The learned Sessions Judge did not consider the inter-play of all these issues and the evidence in his grounds of judgment. The learned trial judge must put his mind to these issues important issues and critically consider and evaluate the evidence in its entirety. There is a need for proper judicial appreciation and appraisal of the evidence in order to arrive at a just decision. E The failure on the part of the learned Sessions Judge to do so would amount to a fundamental misdirection that warrants appellate intervention.

[33] Wherefore, I allowed the appeal and reversed the decision of the trial court. Hence, judgment was entered for the defendant/appellant for the sum of RM2,745,173.52 as per the counterclaim and the plaintiff/respondent's F claim was dismissed.

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